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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT GENE GRISSO, Defendant and Appellant.	C086986 (Super. Ct. No. CRF170002221)

After striking a woman with a baseball bat, defendant Robert Gene Grisso pleaded no contest to assault with force likely to produce great bodily injury and was sentenced to serve a stipulated term of three years in state prison. The court denied his motion under Penal Code section 1018 to withdraw his plea before sentencing.[1]

Defendant contends the trial court abused its discretion in denying his motion to withdraw his plea. He argues the evidence showed his plea was not knowing and voluntary because at the time he entered the plea, he was ignorant of a witness who could

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[1] Undesignated statutory references are to the Penal Code.

potentially impeach the victim and another man present during the assault. He also contends the court applied the wrong legal standard in deciding the motion. We conclude there was no abuse of discretion and no indication the trial court applied the wrong standard. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Around noon on December 10, 2017, S. and the victim drove into the driveway of the victim's residence in Olivehurst. The victim was in the front passenger seat with the window down. Defendant rode up on his bicycle and approached the front passenger side of the car. He struck the victim with a bat on the forehead, ear, and left side of her face approximately three times. After S. yelled at him to stop, defendant rode away on his bicycle.

Later that evening, the victim reported the attack to law enforcement authorities. At the time, the victim had a large red mark above her eye that appeared swollen, but she denied needing medical attention.

Defendant was eventually detained and interviewed. He admitted he rode up to the victim while she sat in the car and advised her that he wanted her out of his residence. While the deputy attempted to confirm the make, model, and color of his bicycle, defendant invoked his *Miranda*[2] rights and the interview was terminated.

Defendant was arrested and charged with felony assault with a deadly weapon, a baseball bat. (§ 245, subd. (a)(1), count one.) Defendant denied the charge. Before the preliminary hearing, the complaint was amended and defendant agreed to plead no contest to assault with force likely to produce great bodily injury (§ 245, subd. (a)(4), count two) without incurring a strike in exchange for a stipulated three-year prison sentence and dismissal of count one.

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2 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

The matter was on calendar for sentencing when defendant requested and received a continuance. Before the continued hearing, defendant filed a written motion to withdraw his plea on the ground he had found a new witness that would support his defense, whom he was unaware of at the time he entered the plea.

In his declaration supporting the motion, defendant stated the victim had been living in a home he co-owned with his brother. At the time of the incident, he had been trying to evict her because she was not paying rent and was "trashing" the home. While in jail awaiting sentencing on his plea, defendant's friend, Sam Trivette, visited him and told him he overheard the victim say she "was going to do whatever it took, to not go homeless . . . she didn't care." Defendant informed his attorney about the jail visit.

At the hearing on the motion, defense counsel explained that before defendant pleaded no contest to the assault offense, counsel contacted six or seven people that "may have witnessed or heard certain things" about the incident, but none provided defendant with a defense. After he entered his plea, Trivette, who counsel acknowledged was on defendant's original witness list before the plea but whom he claimed they had been unable to contact, visited defendant in jail and told him he tried to find his attorney to tell him that he would be a good witness for defendant.

After the jail visit, a defense investigator contacted Trivette for a statement. According to the unsigned investigator's report, Trivette had known defendant for a couple of years and believed he was a good person; he did not believe defendant would hit a woman with a bat, although he might use a bat to intimidate a woman or protect himself from her.

Trivette claimed the man who was in the car with the victim on the day of the assault came to Trivette's house to speak to another person working on Trivette's car at the time. Trivette did not identify the man by name, but only by the blue

car he was driving. During the hearing, defense counsel referred to the man as "Mr. [S.]"[3]

Trivette said he asked the man what happened during the altercation between defendant and the victim. The man stated defendant never "sw[u]ng" the bat at the victim, but he poked her with it and held it to her neck. Defendant also poked the man's car with the bat.

The investigator's report further stated that at some unidentified time before defendant was arrested, Trivette was at defendant's house to help repair some damaged posts when he overheard the "future victim" tell another woman, "I don't care. I had to do it. I don't want to be homeless."

Defense counsel argued the victim's purported statement was enough to impeach her had defendant gone to trial. He also argued that "Mr. [S.]'s" statement that he was there when defendant attacked the victim and defendant did not swing the bat at her but rather poked her with it also had some impeachment value.

The prosecutor opposed the motion, arguing the evidence was insufficient for the court to make a finding of good cause to withdraw the plea. The court agreed and denied the motion, noting that much of defendant's declaration was speculative, included hearsay, and the alleged statements of the identified witnesses were vague and ambiguous. The court specifically found the victim's alleged statement that she did not want to be homeless was insignificant. In the end, the court believed defendant had a "case of buyer's remorse" that was insufficient to allow him to withdraw his plea.

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[3] S. could be the person identified in the probation report as being present when the victim was assaulted.

After denying the motion, the court sentenced defendant to serve the stipulated term of three years in prison. Defendant timely appealed, and the court granted his request for a certificate of probable cause.

DISCUSSION

Defendant contends the trial court abused its discretion in denying his motion to withdraw his plea. We disagree.

At any time before judgment, a defendant may apply under section 1018 to withdraw his or her guilty or no contest plea. (§ 1018; *People v. Rivera* (1987) 196 Cal.App.3d 924, 926-927.) For good cause shown, the court may permit the plea to be withdrawn and a plea of not guilty substituted. (§ 1018.) "Mistake, ignorance, or any other factor overcoming the exercise of free judgment" constitutes good cause to withdraw a guilty or no contest plea. (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) Although section 1018 is to be liberally construed (*People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1506 (*Ramirez*)), a defendant seeking to withdraw his or her plea must establish "good cause" by clear and convincing evidence. (*Cruz*, at p. 566.) A plea may not be withdrawn simply because the defendant has changed his or her mind. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416 (*Breslin*).)

We review an order denying a motion to withdraw a plea for abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *In re Brown* (1973) 9 Cal.3d 679, 685 [the "withdrawal of a guilty plea is left to the sound discretion of the trial court"].) We adopt the trial court's factual findings if substantial evidence supports them. (*Fairbank,* at p. 1254.) With these principles in mind, we conclude there is no basis to disturb the trial court's exercise of discretion in denying defendant's motion to withdraw his no contest plea.

Defendant contends his plea was not knowing and voluntary because he was ignorant of a witness, Trivette, who could potentially impeach the victim and the man in the car with the victim (presumably S.) who witnessed the altercation. Had

he known of Trivette's claim--that S. told him defendant did not swing the bat but poked the victim with it, or that the victim said she did not want to be homeless--at the time he was considering the plea, he would not have waived his rights and entered the plea.

Defendant analogizes the above facts to those in *Ramirez, supra*, 141 Cal.App.4th 1501, but that case is distinguishable. In *Ramirez*, before the defendant pleaded guilty to armed robbery in exchange for dismissal of carjacking and other offenses, a witness contacted police stating that another man, and not the defendant, was involved in the carjacking. (*Ramirez*, at pp. 1504-1505.) The witness provided the police with the name of the actual perpetrator and also turned over property taken from the victims during the robbery that the perpetrator had sold to the witness. (*Ibid.*) The supplemental police report also indicated a named bystander had seen a man, later identified as the same man the first witness said committed the carjacking, exit the bushes near where the car taken in the carjacking crashed. (*Id.* at p. 1505.) Although the prosecution had ample time to provide defendant with a copy of the supplemental police report containing the witnesses' exculpatory statements, it did not do so until after he entered his plea. (*Id.* at p. 1506.)

The court in *Ramirez* concluded the defendant had established by clear and convincing evidence that the prosecution's withholding of favorable evidence affected his judgment in entering the plea. (*Ramirez, supra*, 141 Cal.App.4th at p. 1507.) The court reasoned the supplemental police report identified new defense witnesses, potentially reduced the defendant's custody exposure, and provided possible defenses to several charges, thereby casting the case against him in an entirely different light. (*Id.* at pp. 1507-1508.)

Here, the evidence proffered to support defendant's motion to withdraw his plea fell far short of the showing made in *Ramirez, supra*, 141 Cal.App.4th 1501. First, Trivette's statement concerning the man in the blue car who supposedly witnessed the

altercation did not provide a possible defense to the assault charges. Defendant did not need to swing the bat at the victim to be guilty of the charged offenses. As the People observe, "poking" the victim in the throat and striking the car she was sitting in with a baseball bat was sufficient to establish an assault. (§ 245, subds. (a)(1), (a)(4).) Thus, this evidence would not have provided a defense.

Second, the statement attributed to the victim by Trivette was vague and does not provide a defense. Trivette never identified when he heard the victim allegedly make the statement that she did not want to be homeless and would do whatever it took not to be. He also did not describe the context of the conversation in which the statement was made. Given that Trivette's statement describes the victim as "the future victim," it strongly suggests that she made it *before* the incident. Indeed, according to Trivette's statement, he was at defendant's house helping him repair posts when he heard the alleged statement and this was *before* defendant was arrested. Given the question regarding when this statement was allegedly made (before or after the incident) and how it could be used for any impeachment purpose, the trial court gave the statement little weight in determining whether defendant had met his burden of establishing a mistake of fact regarding the existence of a meritorious defense at the time he entered his no contest plea. (*Breslin, supra,* 205 Cal.App.4th at pp. 1416-1417 [trial court properly viewed victim's recantation after defendant's guilty plea with skepticism].)

Even if the prosecution's case might have been slightly weaker than it appeared when defendant pleaded guilty, this does not invalidate the plea. It might be a different matter if there were actually persuasive, independent evidence the victim falsely reported the assault to police or if the prosecution had withheld critical evidence. (*Breslin, supra,* 205 Cal.App.4th at p. 1417.) Here, no such evidence was presented.

We also reject defendant's claim that the court applied the wrong legal standard in deciding the motion. While the trial court observed that the statements were ambiguous and appeared to contain hearsay, this does not mean the court applied the wrong standard

in determining whether defendant had established good cause to grant the motion. We presume the trial court knows and applies the correct statutory and case law in exercising its official duties. (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032; Evid. Code, § 664.)

Here, defendant's written motion cited section 1018 and relevant legal authority addressing motions to withdraw a plea. The trial court's comments during the hearing do not persuade us that it applied the wrong standard when ruling on the motion. It found defendant's evidence "did not rise to the level" necessary to permit withdrawal of his plea. That is, defendant did not satisfy his burden of showing good cause by clear and convincing evidence.

Based on the record, we conclude the trial court acted well within its discretion when it denied defendant's motion to withdraw his plea.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
RENNER, J.